PLEADING TO AN ACTION OF ASSUMPSIT ON A SPECIALTY, UNDER SEC. 3246a VIRGINIA CODE ANNOTATED.

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By statute is is provided:

"In any case in which an action of covenant will lie there may be maintained an action of assumpsit." [1]

Thus in one sentence occupying less than two lines of type it is sought to efface distinctions of pleading that have grown up with common law itself; distinctions which are among the nicest known to the law, and which have been the subject of interpretation in almost countless decisions.

While it is perhaps true that by this statute these distinctions have been effaced, it has been accomplished by throwing the whole subject into a confusion that only the ingenuity of lawyers and the wisdom of the courts can unravel, and at an expense to litigants that is likely to assume large proportions.

It is not proposed in this article to discuss the effect of the enactment in any philosophical manner, or to suggest the full scope of the change introduced, but only to present one difficulty that has already arisen, as an example of what is yet in store.

The action of covenant is perhaps the most technical that has come down to us with the common law, due, of course, to the particularly tender esteem in which the old jurisconsults held a sealed instrument. A simple instrument was treated with a fair degree of respect and consideration, but attach a seal to it, and immediately it became invested with a sort of solemnity and sacredness which can only be explained by some sort of a reason similar to the reason why a seal must be of wax:

"Sigillum est cera impressa, quia, quia" (as Mr. Minor used always to so impressively repeat), "cera non impressa, non sigillum est."

That a seal is wax impressed, because wax not impressed is not a seal is so obviously the explanation of why a seal is wax impressed that we have no feelings except of pity and contempt for the man

[1] Acts of 1897-98, p. 103, and sec. 3246a, Va Code Anno.

who first suggested the question; and so too no time need be wasted on an explanation of why a sealed instrument was so highly esteemed except to say that it was because it was under seal.

But for whatever reason, it is true that a specialty was invested with certain inherent qualities and attributes that a simple instrument had not, of which many related to matters of defence. Upon an action on a specialty no want of consideration could be set up; no failure of consideration; no breach of warranty. And these were not mere rules of pleading, but they were read into every contract under seal and became a substantive and inseparable part of the contract.

Now, in the action of assumpsit on a simple contract all these defences may be made, and under the general issue of non-assumpsit. In giving the action of assumpsit on a specialty, did the legislature mean to admit these defences under the general issue? If it did not, what is gained by the apparent relaxation in the rules of pleading? The whole tendency of our modern legislation on the subject of pleading is to throw down the bars and require only a *general* complaint and a *general* reply, but nothing of the sort is accomplished if in the new action of assumpsit on a specialty the defence is confined within the old narrow limits.

The question was fairly presented in a case recently decided in the Bedford Circuit Court. It was an action of assumpsit (under sec. 3251 of the Code, as amended) on a life insurance policy which was under seal. In the insured's application, which by reference was made a part of the policy and incorporated into it, were certain warranties by the insured as to his past habits of temperance and the like, as well as promissory warranties as to his future habits.

The defence was based on alleged misrepresentations and breaches of these warranties and was presented by the plea of non-assumpsit and two special pleas setting out the misrepresentations and the warranties and alleged breaches, *but not supported by affidavit.*

The special pleas were not objected to when tendered, but when proof of them was offered the proof was objected to on the ground that the policy or contract being under seal no failure or want of consideration, or fraud, or breach of warranty or any such matter could be availed of as a defence except by a special plea of setoff, verified by affidavit under Va. Code, sec. 3299.

The court, however, overruled the objection, holding that all these matters might be proven in an action of assumpsit *under the general issue.*

It was urged that the new statute established simply a rule of procedure and had to do only with the form of pleading, while such a construction as to admit these defences altered the inherent and substantive qualities of a sealed instrument and deprived it of the attributes with which it was invested. The seal imports finality; it reads into the contract an agreement that the consideration cannot be further enquired into; it eliminates all questions of fraud, misrepresentation or breach of warranty.

Perhaps the insured paid more for the policy because of these advantages, of which he could no more be deprived by the change in pleading than he could be deprived of any advantage of the statute of limitations pertaining to specialties.

Undoubtedly the defence might have been made by a plea of equitable setoff, verified by affidavit under sec. 3299 of the Code, but this was not attempted. By offering the two special pleas the defendant admitted that the defence could not be made under the general issue. Were the rules of pleading the same as in the ordinary action of assumpsit, want or failure of consideration, breach of warranties, or fraud might have been proven under the general issue, as has been repeatedly held.[2] And the tender of the special pleas was an admission that the matter contained therein was not provable under the general issue, else it were idle to offer them. But it would seem to be the correct opinion that the matter was not provable under the general issue.

In *Guarantee Company* v. *Bank,* 95 Va. 480, the lower court was reversed for its failure to receive what was called *Plea No.* 9.

That was an action of debt on a specialty, and in overruling the circuit court Judge Riely said:

"Plea No. 9 presented the defence of fraud in the procurement of the contract. It was not competent at Common Law to set up this defence against a sealed contract, and to enable it to be done was one of the objects of the Act of 1831, now constituting as subsequently amended, sec. 3299 of the Code. *Columbia Acc. Asso.* v. *Rockey,* 93 Va. 678. The defence presented by Plea No. 9 was a valid one, if proved. It could not be made under any plea that was admitted, and the court erred in rejecting it."

[2] Virginia Fire and Marine v. Buck & Newsom, 88 Va. 517.

The defence offered by Plea No. 9 was the misrepresentation by the bank of material facts in the application for the bond upon which the guarantee company was being sued. In the case under discussion, the defence was the misrepresentation by the insured of his past habits and breach of promissory warranties as to the future.

Neither defence could be made at common law at all; it is submitted that neither could be made now, whether in debt or assumpsit, except for sec. 3299, which must be strictly complied with.

Any other construction of the new statute would have the effect of rendering sec. 3299 useless and nugatory without repealing it; for who would resort to a special plea of setoff if the same object could be accomplished under the general issue?

Is not the effect of the new statute to put the action of assumpsit on the same footing with debt? Just as debt can be brought either on a sealed or an unsealed instrument so can assumpsit; as the general issue in debt on a sealed instrument is *non est factum* (an extremely narrow plea), so too in assumpsit on a sealed instrument under the new statute (unless special defences are offered under sec. 3299), the plea should be *non est factum;* and as in debt on a specialty such defences as we are discussing can only be made by pleas of equitable setoff, so in the action of assumpsit on a specialty, which is the counterpart of the action of debt, these defences can only be made by plea of equitable setoff.

That the legislature had some idea of doing away with these distinctions is possible, but that its language is susceptible of such a construction is far from clear. To the writer it seems impossible, though his judgment may be impaired by professional bias.

In any event the subject offers a fruitful field for consideration by the legislature.